Super Glass Corp. and Glassware, Inc. *and* Armando Bocanegra. Cases 29–CA–16056 and 29–CA–16167

July 28, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 26, 1993, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the decision, and the Respondent filed a response to the General Counsel's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] In adopting the judge's finding that the Respondent unlawfully refused to reinstate five striking employees, we reject, as did the judge, the Respondent's contention that it had no work for these five strikers. The evidence indicates that the Respondent utilized several individuals, some of whom were already on the Respondent's payroll, to perform unit work during the strike as well as after the Respondent received the Union's unconditional offer to return to work. These include Bobby Dancy, who had previously been employed by the Respondent but was not employed at the time the strike began and who worked as a blower during the strike; Charles Clitus, who was a glass mold foreman prior to the strike, but was brought in to do unit work; a new Brazilian employee, who began working during the strike as a gatherer and continued to work into January 1992; and Armando St. Louis, a hot end spray equipment foreman prior to the strike who was brought on to perform unit work.

Regardless of whether these individuals were previously working for the Respondent in management or other nonunit positions, or were newly hired, they were clearly replacements performing unit work at a time when the Respondent was obligated to offer that unit work to the unfair labor practice strikers seeking reinstatement.

The judge found, and we agree, that striking employees were unlawfully discharged on October 8, 1991. The Board has held that unlawfully discharged strikers, like unlawfully discharged employees, need not request reinstatement in order to activate the employer's backpay obligation. See *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979). Thus, the discharged strikers are entitled to reinstatement and backpay from the date of the employer's unlawful action until the date he or she is offered reinstatement. To the extent that the judge's remedy and recommended Order do not explicitly indicate that backpay shall be calculated from October 8, 1991, we clarify them to so provide.

[2] Member Cohen agrees that the Respondent unlawfully discharged its striking employees on October 8, 1991, in violation of Sec. 8(a)(3). Having so found, it is, in Member Cohen's view, unnecessary to determine whether the economic strike subsequently converted to an unfair labor practice strike and whether the Respondent's subsequent refusals to reinstate violated the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Super Glass Corp. and Glassware, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Thomas M. Maher, Esq., for the General Counsel.
Barnett Friedman, of Brooklyn, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on September 21 and 22, 1992, and the record was closed on November 2, 1992. Upon charges filed on October 22 and December 4, 1991,[1] a consolidated complaint was issued on December 18, alleging that Super Glass Corp. violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). The Company filed an answer denying the commission of the alleged unfair labor practices. At the hearing I granted General Counsel's motion to amend the complaint and caption to name Super Glass Corp. and Glassware, Inc. as a single employer. Those companies are referred to here as Respondent.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. A brief was filed by the General Counsel and a letter of memorandum was filed by the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND SINGLE EMPLOYER STATUS

Super Glass Corp. and Glassware, Inc., both New York corporations with their principal offices and places of business in Brooklyn, New York, have been engaged in the manufacture of blown glass and related products. It has been admitted that Super Glass Corp. and Glassware, Inc. are a single integrated business enterprise with common ownership, officers, directors, and supervisors in a common business purpose and common owners, officers, and directors of the companies formulate common labor relations policy with respect to the employees of the companies.

The Respondent annually purchases and receives at its Brooklyn facility goods valued in excess of $50,000 either directly or indirectly from points located outside New York State. The Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 6, Amalgamated Industrial and Service Workers Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates refer to 1991 unless otherwise specified.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent and the Union have had a collective-bargaining relationship since 1988 and were parties to a contract that was effective by its terms from September 28, 1988, to September 28, 1991. The Union at all material times represented an appropriate unit of Repondent's production employees, including glass blowers and gatherers.

Representatives of the Union, Respondent, and unit employees met on several occasions during September to negotiate a new contract. The parties were unable to reach a new agreement and on September 30, Armando Ponce, a representative of the Union, went to the Respondent's facility to take a strike vote among the Respondent's employees. A majority of employees voted to go out on strike in support of the Union's position in the negotiations.

On October 1, 15 of Respondent's employees began a strike that lasted until October 16. These striking employees picketed outside of Respondent's facility throughout the strike. On October 2, Respondent's president, Barnett Friedman, sent a letter to each of the strikers[2] which stated, in pertinent part, ''unless employees return to work Tuesday, October 8, 1991—7 A.M., those employees who refuse to work . . . will be terminated.'' In a subsequent sworn affidavit Friedman conceded that the purpose of the letter was to inform employees that if they did not return on that date they would be ''discharged from employment.'' Fausto Carty, who appeared to me to be a credible witness, regarded the letter as a threat and testified that he understood that if he did not return on October 8 that he would be fired. On October 8, Friedman appeared at the picket line and told the strikers that he had hired replacements. Carty credibly testified that Friedman told him at the time ''if we would not go into the factory and start working immediately we would be fired.'' None of the strikers returned to work on October 8. Friedman testified that as of the close of business on October 8 he considered all of the striking employees fired.

On October 16, the Union made an unconditional offer to return to work on behalf of all the striking employees. Respondent accepted the offer to return to work made on behalf of the strikers but failed to reinstate five employees including Carty, Gabriel-Camargo, Millan-Cobo, Guija, and Bocanegra. Respondent continued to employ replacement workers after receiving the strikers' unconditional offer to return to work.

B. *Discussion and Conclusions*

1. Threats

On October 1, Respondent's employees began an economic strike in support of the Union's position taken in the course of the negotiations for a new contract. In response to the strike Friedman sent a letter to all striking employees dated October 2, stating that employees who refuse to return to work by October 8 would be ''terminated.'' While Friedman contended at the hearing that he meant the letter to indicate that employees would be ''permanently replaced,'' the letter, in fact, states that employees would be terminated. In addition, Friedman's subsequent sworn affidavit stated that ''the letter set a return date of October 8, 1991. If the employees failed to return on that date, they would be terminated. By this I meant discharged from employment.'' As late as the date of the hearing, Friedman testified that as of close of business on October 8 he considered all of the employees ''fired.'' Employees testified that they viewed the letter as containing a threat of discharge. It is well-established that threats of discharge made to economic strikers violate Section 8(a)(1) of the Act. See *Gloversville Embossing Corp*., 297 NLRB 182, 183 fn. 5 (1989); *La Famosa Foods*, 282 NLRB 316, 327 (1986). I find that Respondent threatened the strikers with discharge, in violation of Section 8(a)(1) of the Act.

2. Discharge of economic strikers and conversion of the strike into an unfair labor practice strike

The letter sent by Respondent set a return date of October 8 for strikers to return to work. No strikers returned to work on that day and Friedman testified that as of the close of business on that day he considered that all of the strikers had been fired. In addition, the strikers understood from the October 2 letters that they were discharged as of October 8. It is well-settled that while an employer may permanently replace strikers, it may not terminate them because they engage in protected activity. See *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The Board has held that the unlawful discharge of strikers is a violation of Section 8(a)(1) and (3) and is ''a blow to the very heart of the collective-bargaining process'' and ''leads inexorably to the prolongation of a dispute.'' *Vulcan-Hart Corp*., 262 NLRB 167, 168 (1982), enf. granted in part and denied in part on other grounds 718 F.2d 269 (8th Cir. 1983).

An economic strike may be converted by the actions of an employer into an unfair labor practice strike where an employer commits unfair labor practices during a strike, or there is a causal connection shown between unfair labor practices and the prolonging of a strike. See *Robbins Co*., 233 NLRB 549 (1977). In *Gloversville Embossing Corp*., supra, 297 NLRB 182, the employer sent a letter dated September 4 to striking employees, notifying them that if they failed to return to work by September 9, they would be ''terminated.'' The Board held there that the employer unlawfully discharged the strikers and converted the strike into an unfair labor practice strike effective September 9, because ''unlawful discharges by their nature have a reasonable tendency to prolong a strike and therefore afford a sufficient basis for finding a conversion to an unfair labor practice strike.'' Id. I find, therefore, that by its actions, as of October 8, Respondent converted the economic strike into an unfair labor practice strike.

[2] The complaint alleges that 16 employees participated in the strike, including Francisco Calderon. Respondent maintains that Calderon had been ill prior to the commencement of the strike and consequently did not participate in the strike. While Guija testified that Calderon participated during the first day of the strike he also testified that Calderon ''didn't take part in the strike.'' No one else testified that Calderon participated in the strike. In view of Guija's inconsistent testimony and Friedman's clear testimony that Calderon did not strike, I credit Friedman's testimony and find that Calderon did not participate in the strike.

3. Employment of replacements and failure to reinstate all strikers after their unconditional offer to return to work

Once unfair labor strikers make an unconditional offer to return to work an employer will be found to have violated Section 8(a)(1) and (3) of the Act if it fails to offer them immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions. *Harowe Servo Controls*, 250 NLRB 958, 1070 (1980). An employer must offer the strikers reinstatement even if permanent strike replacements have to be discharged.

There is no dispute that the Union made an unconditional offer to return to work on behalf of the strikers on October 16. At that time Respondent reinstated 10 of the strikers but failed to reinstate employees Carty, Gabriel-Camargo, Millan-Cobo, Guija, and Bocanegra. Friedman did not deny that he failed to recall these five strikers but contends that he had no work for them. However, there is evidence in the record that Respondent had employed replacement workers during the strike, and has continued to do so after the strike.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening to discharge economic strikers Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discharging and refusing to reinstate striking employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having failed to reinstate striking employees Carty, Gabriel-Camargo, Millan-Cobo, Guija, and Bocanegra upon their unconditional offer to return to work on October 16, 1991, I find it necessary to order Respondent to offer them full and immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary to effectuate such reinstatement any person hired by Respondent after October 8, 1991. In addition, Respondent shall make all of the striking employees whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay shall be computed in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

[3] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Super Glass Corp. and Glassware, Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening economic strikers with discharge.

(b) Discharging and refusing to reinstate employees because they have engaged in a protected strike.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer striking employees Carty, Gabriel-Camargo, Millan-Cobo, Guija, and Bocanegra immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements hired after October 8, 1991, and make them whole for any loss of earnings, with interest, in the manner set forth in the remedy section of this deacision.

(b) Make whole striking employees Luisito Luis, Papi Luis, Quispe, Reynoso, Timoran, Corona, Loyza, Velez, Brito, and Martin for any loss of earnings suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Remove from their files any references to the unlawful discharges of the striking employees and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Brooklyn, New York, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten economic strikers with discharge.

WE WILL NOT discharge and refuse to reinstate employees because they have engaged in a protected strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer striking employees Carty, Gabriel-Camargo, Millan-Cobo, Guija and Bocanegra immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements hired after October 8, 1991, and make them whole for any loss of earnings, with interest.

WE WILL make whole striking employees Luisito Luis, Papi Luis, Quispe, Reynoso, Timoran, Corona, Loyza, Velez, Brito, and Martin for any loss of earnings, with interest.

WE WILL remove from our files any references to the unlawful discharges of the striking employees and notify them in writing that this has been done and that the discharges will not be used against them in any way.

SUPER GLASS CORP. AND GLASSWARE, INC.